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## Cyber Flashing: Unwanted and Non-Consensual Lewd Photographs as Technology Enhanced Sexual Harassment

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## I. Introduction

Cyber flashing is defined as “sharing sexually explicit images via digital technologies (e.g., text messaging, instant social media, or Bluetooth) to unsuspecting or non-consenting recipients.”<sup>1</sup> The term cyber flashing is inclusive of self-produced lewd content such as images of a man’s penis in what is referred to in modern society as “dick pics.”<sup>2</sup> In March 2019, Whitney Wolfe Herd, the CEO of feminist dating app Bumble, testified on behalf of a bill in Texas that for the first time criminalized cyber flashing in the state.<sup>3</sup> In the course of her testimony, she implored lawmakers to take action: “if indecent exposure is a crime on the streets, then why is it not on your phone or computer? ... [A]s tech companies, we can only do so much. Please help us fill the gaps where we fall short.”<sup>4</sup> She lamented that “[u]nsolicited dick pics have become a ubiquitous part of modern life.”<sup>5</sup>

To date, there is limited data on the prevalence of cyber flashing in the United States, but the data that does exist indicates that it is a common place phenomenon.<sup>6</sup> A 2017 Pew Research poll found that 52% of young women and 37% of young men between 18 to 29 years old say they

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<sup>1</sup> Craig A. Harper et al., *Delineating non-consensual sexual image offending: Towards an empirical approach*, PSYARXIV (June 12, 2019) <https://www.psycharxiv.com/pydn>.

<sup>2</sup> *Id.* (citing Wailing & Pym, ‘C’mon, no one wants a dick pic’: Exploring the cultural framings of the ‘dick pic’ in contemporary online publics, 28 J. GENDER STUD. 70-85 (Oct. 2017) <https://www.doi.org/10.1080/09589236.2017.1394821>).

<sup>3</sup> Arwa Mahdawi, *Put it Away: Texas passes law banning dick pics*, THE GUARDIAN (Sept. 7, 2019) <https://www.theguardian.com/commentisfree/2019/sep/07/texas-passes-law-against-dick-pics-week-in-patriarchy>.

<sup>4</sup> Nicole Cobler, *Bumble founder wants Texas lawmakers to make unwanted sexting a crime*, THE DALLAS MORNING NEWS (Mar. 26, 2017) <https://www.dallasnews.com/business/technology/2019/03/26/bumble-founder-wants-texas-lawmakers-to-make-unwanted-sexting-a-crime>.

<sup>5</sup> Mahdawi, *supra* note 3.

<sup>6</sup> *Online Harassment 2017*, PEW RES. CTR. (July 11, 2017) <https://www.pewresearch.org/internet/2017/07/11/online-harassment-2017.8>.

have been sent unwanted or nonconsensual sexually explicit images.<sup>7</sup> Eighty three percent of women aged 18 to 29 consider online harassment such as cyber flashing to be a “major problem.”

One troubling iteration of cyber flashing utilizes Bluetooth or Apple AirDrop technology to anonymously bombard women in crowded public places with anonymously sent sexually explicit images.<sup>8</sup> Apple’s AirDrop feature can send anonymous photographs and messages from one iPhone to any other iPhone within 30 feet of each other, identifying the sender and receiver of any content only by a self-chosen name for the device assigned in the settings of the device.<sup>9</sup> A recipient of AirDropped content is offered a thumbnail preview of the message or photograph and while the content can be dismissed and the sender can repeatedly resend content that must be individually dismissed each time.<sup>10</sup> Crowded trains are a common venue for perpetrators of cyber flashing to send lewd content to women’s iPhones via AirDrop in this manner.<sup>11</sup> One such woman reported a photo of an erect penis Airdropped to her phone the moment she sat down and took her iPhone out on a busy train.<sup>12</sup> She was the only woman in the car and “she felt targeted.”<sup>13</sup> Although she declined the AirDrop request, a preview of the photo displayed on the lock screen.<sup>14</sup> She felt “shocked and grossed out.”<sup>15</sup> But it didn’t end there. She described her panic when, “[the photo] popped up again, and again.” She went on, saying, “I started to go into my settings but the ... photo

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<sup>7</sup> *Id.*, PEW RES. CTR. (July 11, 2017) <https://www.pewresearch.org/internet/2017/07/11/online-harassment-2017.8>; Mahdawi, *supra* note 3.

<sup>8</sup> Sharon Otterman, *Sending Lewd Nudes to Strangers Could Mean a Year in Jail*, N.Y. TIMES (Nov. 30, 2018) <https://www.nytimes.com/2018/11/30/nyregion/airdrop-sexual-harassment.html>.

<sup>9</sup> Sophie Gallagher, ‘*He Was Staring At Me Across The Concourse, His Hands Were Shaking*’: Why Cyber Flashing Isn’t Just A Digital Problem, HUFFPOST UK (Feb. 5, 2019) [https://www.huffingtonpost.co.uk/%2Fentry/%2Fhe-was-staring-at-me-across-the-concourse-his-hands-were-shaking-why-cyberflashing-isnt-just-a-digital-problem\\_uk\\_5ca1ca0de4b0bc0dacab0dd0&usg=AOvVaw2WwI50QLQR3sjq6Iyel03M](https://www.huffingtonpost.co.uk/%2Fentry/%2Fhe-was-staring-at-me-across-the-concourse-his-hands-were-shaking-why-cyberflashing-isnt-just-a-digital-problem_uk_5ca1ca0de4b0bc0dacab0dd0&usg=AOvVaw2WwI50QLQR3sjq6Iyel03M) [hereinafter Gallagher, *Sending Lewd Nudes to Strangers*].

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Mahdawi, *supra* note 3.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

kept popping up until I finally switched Airdrop off," she says. "I couldn't work out who did it — the [train] was relatively packed and it was just really grim."<sup>16</sup>

Another young woman reported making eye contact with and being subsequently followed by a man who she suspected to be the person behind the repeated, rapid-fire graphic sexual photographs AirDropped to her phone even while her father accompanied her on a train.<sup>17</sup> Cyber flashing is not limited to crowded trains, however, and takes place in a variety of settings: a lecture hall in the first week as a freshman in college, while out to lunch with coworkers, or from men they only wish to do business with such as a potential landlord or business connections.<sup>18</sup> Cyber flashing takes place over more than just AirDrop as well. Perpetrators also utilize private, direct messaging features available on social media and on dating websites and apps to send sexually explicit material without consent.<sup>19</sup>

The reality of cyber flashing can be terrifying and violating.<sup>20</sup> The limited data available on the subject indicates a widespread problem with damaging consequences that is nonetheless not receiving its due attention as an issue worthy of serious examination.<sup>21</sup> In a 2018 New York Times article, Danielle Citron, a law professor at the University of Maryland and author of a book on hate crimes in cyberspace, praised New York City for being the first American municipality to consider and eventually pass a law targeting cyber flashing specifically, but lamented that there were “no statistics tracking the prevalence of cyber flashing” in the United States and that “the entire field

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<sup>16</sup> *Id.*

<sup>17</sup> Gallagher, *Sending Lewd Nudes to Strangers*, *supra* note 9.

<sup>18</sup> Otterman, *supra* note 8; Mahdawi, *supra* note 3.

<sup>19</sup> Mahdawi, *supra* note 3.

<sup>20</sup> Sophie Gallagher, 'Violated, Sick, Uncomfortable': 10 Women On Being Sent Unsolicited Dick Pics, HUFFPOST UK (Oct. 26, 2018) [https://www.huffingtonpost.co.uk/entry/it-was-scary-not-knowing-who-might-follow-me-off-the-train-women-talk-about-how-it-feels-to-be-sent-unsolicited-dick-pics\\_uk\\_5bcec723e4b0d38b587baa52](https://www.huffingtonpost.co.uk/entry/it-was-scary-not-knowing-who-might-follow-me-off-the-train-women-talk-about-how-it-feels-to-be-sent-unsolicited-dick-pics_uk_5bcec723e4b0d38b587baa52) [hereinafter Gallagher, *Violated, Sick, Uncomfortable*].

<sup>21</sup> Otterman, *supra* note 8.

of electronic harassment is woefully understudied.”<sup>22</sup> Professor Citron nonetheless urged that “it is absolutely possible to regulate [cyber flashing] ... just like we have telephone harassment laws that have been upheld by federal and state courts.”<sup>23</sup>

This paper will describe the importance and status of efforts to curb technology enhanced sexual harassment of women online and over text message via cyber flashing and proposes the adoption of specific legislation across the United States. Part II describes the consequences to women and society when cyber flashing and other related forms of cyber sexual harassment are not regulated. This is a widespread problem for women around the world but more data is needed to record the scope and full consequences of cyber flashing. Next, Part III provides an overview of the inadequate remedies available to women and men who are victims of cyber flashing. Most promising is Texas legislation which became effective in September 2019 that criminalizes cyber flashing, however, it is not without issue. Part III also details the legal challenges and defenses most likely to be raised in opposition to the law and whether changes in the language of the law would better meet the aims it seeks to remedy. This paper ultimately concludes that although the Texas’s Penal Code’s criminalization of cyber flashing may be the best attempt at deterrence by a U.S. city or state to date, a modified version of the statutory language that is less susceptible to First Amendment overbreadth challenges should be adopted in other states. This paper recommends the adoption of improved statutory language to strengthen any further iterations of cyber flashing legislation against constitutional challenge.

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

## II. Cyber Flashing as Technology Enhanced Sexual Harassment has Real Consequences Necessitating Legal Solutions

This section seeks to describe the harms that arise from cyber flashing, particularly to women. Women in the United States continue to face barriers to achieving equality with men.<sup>24</sup> Women in the United States have the lowest labor force participation levels for college educated women than more than twenty other first world countries,<sup>25</sup> and the well-documented pay gap in between women and men's earned income, although narrowing on the whole,<sup>26</sup> is reported to be growing rather than shrinking in some American industries.<sup>27</sup> While both men and women can be victims of harassment, women—especially young women—are “disproportionately targeted by sexualized forms of abuse.”<sup>28</sup> “Compared with similarly aged men, women ages 18 to 29 years are more than twice as likely to report being sexually harassed online and are more vulnerable to physical threats and sustained harassment.”<sup>29</sup> Sexual violence exists on a “continuum of unsafety,” where the “brutal rape, the sexually harassing comments, the slap on the face, the grab on the street” are the “everyday, commonplace nature of women's experience of men's behavior that women themselves perceive and/or experience as intimidating, threatening, coercive, or violent” and serve to remind women of their “vulnerability to men.”<sup>30</sup> Misogynistic conversations and

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<sup>24</sup> Ariane Hegewisch, et al., *Statutory Routes to Workplace Flexibility in Cross-National Perspective*, INST. FOR WOMEN'S POL'Y RES. (Dec. 21, 2007) <http://www.lisdatacenter.org/wp-content/uploads/2011/02/flex-work-report.pdf>.

<sup>25</sup> *Id.*

<sup>26</sup> Nikki Graf et al., *The narrowing, but persistent, gender gap in pay*, PEW RES. CTR. (Apr. 9, 2018) <http://leametz.pbworks.com/f/Gender%20pay%20gap%20has%20narrowed%2C%20but%20changed%20little%20in%20past%20decade.pdf>.

<sup>27</sup> Sean O'Neil, *Gender pay gap grows*, 241 NEW SCIENTIST 3223, 45 (Mar. 30, 2019) [https://doi.org/10.1016/S0262-4079\(19\)30563-9](https://doi.org/10.1016/S0262-4079(19)30563-9).

<sup>28</sup> Kalyani Chadha, *Women's Responses to Online Harassment*, 14 INT'L J. COMM. 239-57 (2020) <https://ijoc.org/index.php/ijoc/article/view/11683>.

<sup>29</sup> *Id.*

<sup>30</sup> Rebecca Hayes & Molly Dragiewicz, *Unsolicited dick pics: Erotica, exhibitionism or entitlement?*, 71 WOMEN'S STUD. INT'L F. 114 (2018) <https://doi.org/10.1016/j.wsif.2018.07.001>.

sexually aggressive behavior—such as cyber flashing—perpetrated by men in dating apps is a demonstration of men attempting to “position themselves and the feminine subject in ways that reinforce traditional gender hierarchies.”<sup>31</sup> Women continue to face barriers to an existence free from humiliation or demeaning behavior from some men.<sup>32</sup>

Cyber flashing is but one form of “technology enhanced sexual harassment” on a continuum of offenses involving nonconsensual sexual images sent via digital means.<sup>33</sup> Technology enhanced sexual harassment, inclusive of cyber flashing, can “limit women’s confidence and security in public places.”<sup>34</sup> Other forms of technology enhanced sexual harassment include revenge porn, defined as the intentional distribution of non-consensual porn, usually perpetrated by an ex-sexual partner.<sup>35</sup> Similar in nature is using what is called “deepfake pornography,” which can be used similarly to revenge porn but instead of misusing genuine photos, a victim’s face is essentially superimposed onto a porn actress before distribution online.<sup>36</sup> An older form of technology enhanced sexual harassment is “upskirting” where discrete camera work is used to capture photos and video up women’s skirts in public places and then distributed online.<sup>37</sup> Some of these issues have been somewhat more widely regulated because they have been publicly recognized as legal issues for a longer time than cyber flashing, which arose more recently

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<sup>31</sup> Laura Thompson, “*I can be your Tinder nightmare*”: Harassment and misogyny in the online sexual marketplace, 28 FEMINISM & PSYCHOL. 69-89 (Feb. 8, 2018) <https://doi.org/10.1177/0959353517720226>.

<sup>32</sup> Hayes & Dragiewicz, *supra* note 30.

<sup>33</sup> Harper, *supra* note 1.

<sup>34</sup> *Id.*

<sup>35</sup> Cara Bayles, *With Online Revenge Porn, The Law Is Still Catching Up*, LAW360 (Mar. 1, 2020, 8:02 PM) <https://www.law360.com/articles/1247863>.

<sup>36</sup> Rebecca Ruiz, *Deepfakes are about to make revenge porn so much worse*, MASHABLE (June 24, 2018) <https://mashable.com/article/deepfakes-revenge-porn-domestic-violence>.

<sup>37</sup> Katie O’Malley, *What is Upskirting and When Did It Become a Criminal Offense?*, INDEPENDENT (Apr. 12, 2019) <https://www.independent.co.uk/life-style/women/upskirting-illegal-definition-crime-uk-sexual-harassment-a8864636.html>.



as smartphones became commonplace in the last decade.<sup>38</sup> Nonetheless, many of the attempts to legislate solutions for technology enhanced sexual harassment, discussed more in Part III below, have been criticized as remaining inadequate in both scope and remedy.<sup>39</sup>

**a. Who is Affected by Cyber Flashing and is it a Common Problem?**

Cyber flashing is a common occurrence but unfortunately has not been the subject of much research or legislation, in part because its prevalence and scope are not widely understood.<sup>40</sup> There are few empirical statistical inquiries tracking the prevalence of cyber flashing.<sup>41</sup> The Pew Research Center in 2017 reported that “52% of women ages 18 to 34 reported receiving an explicit image they didn’t ask for,”<sup>42</sup> and in 2020 published a follow up indicating that figure jumped to 57%.<sup>43</sup> A more in depth inquiry into cyber flashing was published in 2018 by YouGov, an international research data and analytics group headquartered in London.<sup>44</sup> A statistically significant sample of adults aged 18 to 36 years old were polled to gauge the scope of the “dick pic” problem and men and women’s impressions of the practice.<sup>45</sup> The results were striking. Close to half (46%) of millennial women aged 18-36 reported receiving a “dick pic,” consensual or not, but nine out of ten of those women who received such a photo did not ask for it.<sup>46</sup> Forty-six percent

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<sup>38</sup> Morten Birk Hansen Mandau, *Directly in Your Face: A Qualitative Study on the Sending and Receiving of Unsolicited ‘Dick Pics’ Among Young Adults*, 24 SEXUALITY & CULTURE 72-93 (2020) <https://doi.org/10.1007/s12119-019-09626-2>.

<sup>39</sup> S. Pashang et. al., *The Mental Health Impact of Cyber Sexual Violence on Youth Identity*, 17 INT. J. MENT. HEALTH ADDICTION 1119-31 (2019) <https://doi.org/10.1007/s11469-018-0032>.

<sup>40</sup> Thompson, *supra* note 31.

<sup>41</sup> Otterman, *supra* note 8.

<sup>42</sup> *Online Harassment 2017*, *supra* note 6.

<sup>43</sup> *The Virtues and Downsides of Online Dating*, PEW RES. CTR. (Feb. 6, 2020) <https://www.pewresearch.org/internet/2020/02/06/the-virtues-and-downsides-of-online-dating>.

<sup>44</sup> Matthew Smith, *Four in ten female millennials have been sent an unsolicited penis photo*, YOUNGOV: WHAT THE WORLD THINKS (Feb. 15, 2018, 7:00 PM) <https://yougov.co.uk/topics/politics/articles-reports/2018/02/16/four-ten-female-millennials-been-sent-dick-pic>.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

of the millennial women who received a "dick pic" were under 18 years old the first time it happened, and "this figure rises to 71% for 18-24 year olds."<sup>47</sup> Likewise, 30% of millennial men who admitted to sending a penis picture did so while they were under 18, and that figure increased to 44% among 18-24 year olds.<sup>48</sup> In total, 41% of women aged between 18 and 36 were sent an "unsolicited photo of a man's private parts."<sup>49</sup> For those over 36 years old, penis photos are still a measurable phenomenon but are not as common as for the younger generations of adults and teens. Over one third of 35 to 54 year olds, and 8% of adults age 55 and older, have also been the recipients a nonconsensual photo of a penis.<sup>50</sup> The data indicate that unsolicited penis pictures are commonplace among younger generations.

#### **b. Consequences and Harm to Women if Continued Non-Regulation**

Both gender-based street harassment and sexual harassment occurring without the assistance of technology have well documented detrimental effects on women as a group.<sup>51</sup> Street harassment and sexual harassment affect both the target's quality of life and feelings of safety and autonomy<sup>52</sup> and the economy at large when reduced productivity and wages are taken into account.<sup>53</sup> In the employment setting, "[h]arassment undermines women's workplace authority, reduces them to sexual objects, and reinforces sexist stereotypes about appropriate gender behavior."<sup>54</sup> The effects of sexual harassment can also be long lasting: feelings of anger, self-

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Maria DelGreco, *Effects of Street Harassment on Anxiety, Depression, and Sleep Quality of College Women*, 82 SEX ROLES 473 (2020) <https://doi.org/10.1007/s11199-019-01064-6>.

<sup>52</sup> J.N. Houle et al., *The Impact of Sexual Harassment on Depressive Symptoms During the Early Occupational Career*, 1 SOC. MENT. HEALTH 2 89-105 (JULY 2011).

<sup>53</sup> Heather McLaughlin et al., *The Economic and Career Effects of Sexual Harassment on Working Women*, 31 GENDER & SOC'Y 333 (2017).

<sup>54</sup> *Id.*

doubt, and depressive symptoms can linger nearly a decade after an incident of sexual harassment.<sup>55</sup> Sexual harassment was found to “increase financial stress, largely precipitating job change, and can significantly alter women’s career attainment.”<sup>56</sup> Furthermore, sexual harassment costs the government millions.<sup>57</sup> In 2019, sexual harassment charges filed with the U.S. Equal Employment Opportunity Commission (2019) cost organizations and harassers \$68.2 million, excluding monetary damages awarded through damages awarded through litigation.<sup>58</sup>

In the context of technology enhanced sexual harassment, the consequences can vary just as much as in person sexual harassment. Technology enhanced sexual harassment is a term that includes revenge porn, upskirting, deepfake technology pornography, and cyber flashing.<sup>59</sup> In the context of revenge porn, one woman reported that “hundreds or thousands of people” have harassed her after her ex-boyfriend distributed graphic sexual photographs and videos of her online that went viral.<sup>60</sup> She stated that “whenever a new post went up, she felt as though she’d been ‘sexually assaulted at that moment.’”<sup>61</sup> She took to leaving her phone at home to avoid notifications of new uploads or solicitations from strangers, citing that it had become “an abuse machine.”<sup>62</sup> As for cyber flashing, the effects can be similarly violating and intrusive. Some women have opted to changing their iPhone’s name to something like “John’s work phone” to deter cyber flashing, reporting that it was effective and “the dick pics stopped immediately.”<sup>63</sup> For women who wish to

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> U.S. Equal Employment Opportunity Commission, *Charges alleging sexual harassment* (FY 2010 – FY 2019) 2019. Retrieved May 5, 2020. [http://eeoc.gov/eeoc/statistics/enforcement/sexual\\_harassment\\_new.cfm](http://eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm).

<sup>58</sup> *Id.*

<sup>59</sup> Harper, *supra* note 1.

<sup>60</sup> Bayles, *supra* note 35.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Sophie Gallagher, *Cyber Flashing: 70 Women On What It’s Like To Be Sent Unsolicited Dick Pics*, HUFFPOST UK (May 21, 2019), [https://huffingtonpost.co.uk/entry/cyberflashing-70-women-on-what-its-like-to-be-sent-unsolicited-dick-pics\\_uk\\_5cd59005e4b0705e47db0195](https://huffingtonpost.co.uk/entry/cyberflashing-70-women-on-what-its-like-to-be-sent-unsolicited-dick-pics_uk_5cd59005e4b0705e47db0195) (interviewing and quoting 70 HuffPost readers who were cyber flashed

enjoy the full functionality of their phone's functions and capability should not have to opt out of a service the iPhone is known for to avoid cyber flashing.<sup>64</sup> Women who were cyber flashed via AirDrop reported feeling violated, exposed, vulnerable, disgusted, frightened, ashamed, confused, shocked, disrespected, that their safety was at risk, and discouraged or nervous about travelling in crowded places.<sup>65</sup>

Men and women experience unsolicited dick pics differently. Noting that a previous "review of dick pic research"<sup>66</sup> in 2018 indicated that no study to date had "investigated men's or women's experiences of men's distribution of unsolicited dick pics to women in depth." Danish psychologist Morten Birk Hansen Mandau conducted a 2019 qualitative study exploring personal experiences with unsolicited "dick pics."<sup>67</sup> Results from that study showed that girls experience unsolicited "dick pics" as intrusive, shocking, unpleasant, and as misguided attempts at flirting, "while boys perceive [it] as a way of showing off, complimenting, hooking-up with or getting nude pictures in return from girls."<sup>68</sup> The United Kingdom's YouGov study similarly found that men who send these photographs believe in good faith that even their completely unsolicited penis pictures will be well received.<sup>69</sup> However, women described penis pictures as "gross" and "stupid" while men sending them were more likely to call them "sexy," "funny," or "boring," and sent with

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in public places such as in restaurants, on the subway, university classrooms, and other settings via AirDrop in various cities across the United Kingdom) [hereinafter Gallagher, 70 Women].

<sup>64</sup> Tim McNicholas, *Will Apple's New AirDrop Features Deter Cyber Flashing? Chicago Victims Hope So*, CBS CHI. (Oct. 2, 2019) <https://chicago.cbslocal.com/2019/10/02/cyber-flashing-airdrop-apple-iphone-ipod>.

<sup>65</sup> *Id.*

<sup>66</sup> R.M. Hayes & M. Dragiewicz, *Unsolicited dick pics: Erotica, exhibitionism or entitlement?*, 71 WOMEN'S STUD. INT'L F. 114- (2018), <https://doi.org/10.1016/j.wsif.2018.07.001>.

<sup>67</sup> Mandau, *supra* 38.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*; Smith, *supra* note 44.

the intention to flirt or titillate.<sup>70</sup> There is a disconnect between men and women on the issue of cyber flashing and whether it even has the potential to be harmful.<sup>71</sup>

However, it is notable that men who receive explicit nude photos appear to welcome them on the whole. One research study described how “dick pics” are viewed differently in homosexual relationships between same-sex men, carrying a more positive meaning on gay social media and dating apps such as “Grindr.”<sup>72</sup> Men appear to be welcome recipients of unsolicited explicit pictures from women as well.<sup>73</sup> One woman reportedly sent about 40 men an unsolicited photo of a vagina in a dating app, looking to give men a taste of their own medicine, but the photos were met with enthusiastic approval and requests to meet her.<sup>74</sup>

Overall the consequences for women are ones that are negative, threatening, and make them feel sexualized in non-sexual environments.<sup>75</sup>

### **III. Attempts to Deter Cyber Flashing**

Technology enhanced sexual harassment is not a new phenomenon and changes as technology progresses. The methods by which sexually harassing content is sent to women via technology is on devices of many different brands with software and apps made by countless corporations. As a result, the remedies through these privatized entities are limited to Community

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<sup>70</sup> Smith, *supra* note 44.

<sup>71</sup> *Id.*

<sup>72</sup> E. Tziallas, *Gamified eroticism: Gay male “social networking” applications and self-pornography*, 19 *SEXUALITY AND CULTURE* 4, 759-75.

<sup>73</sup> Kerry Quinn, *Here’s What Happens When You Send 40 Unsuspecting Guys a Preemptive V-Pic*, THRILLIST (Nov. 18, 2015) <https://www.thrillist.com/sex-dating/los-angeles/we-sent-a-preemptive-v-pic-before-dudes-could-send-dick-pics-heres-what-happened>.

<sup>74</sup> *Id.*

<sup>75</sup> Mandau, *supra* note 38.

Guidelines<sup>76</sup> or Community Standards<sup>77</sup> for use that almost always include some manner of prohibition on harassment or hate speech but are difficult to enforce and users have complained to media sources about a lack of accountability when policies are routinely not adequately enforced.<sup>78</sup> Targets of technology enhanced sexual harassment in these apps can report a user or block them, and the app may suspend or disable the accounts of users who are reported.<sup>79</sup> However, these solutions are perceived as inadequate because they lack a deterrent effect extrinsic to the app itself. Consequences within the app itself are limited when the user who sent abusive content can usually easily create a new account under another email address or switch to one of the many other popular apps and websites.<sup>80</sup> Recipients of harassing or abusive messages have attempted to create their own remedies, such as threatening to screenshot the offending messages and post them publicly or send them to the abuser's mother or employer.<sup>81</sup> Unfortunately many victims of technology enhanced sexual harassment feel disinclined to report to authorities or to the app in question because they feel that nothing can be done because they lack definitive proof of who is at fault or believe any available remedies would be inadequate and would not be worth the prolonged harm.<sup>82</sup>

Despite the lack of recourse for victims of technology enhanced sexual harassment in dating applications, there are critics of any further regulation. For example, in September 2019

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<sup>76</sup> Tinder Community Guidelines, (accessed May 19, 2020) <https://www.gotinder.com/community-guidelines>.

<sup>77</sup> Facebook Community Standards, Bullying and Harassment (accessed May 19, 2020) <https://www.facebook.com/communitystandards/bullying>.

<sup>78</sup> Brent Holmes, *How Rejected Men Use Dating Apps to Torment Women*, VICE (May 25, 2017) [https://www.vice.com/en\\_us/article/8x4jbg/when-harassers-use-tinder-and-bumble-to-dox-and-women](https://www.vice.com/en_us/article/8x4jbg/when-harassers-use-tinder-and-bumble-to-dox-and-women).

<sup>79</sup> Elizabeth Nolan Brown, *New York City Wants to Make It Illegal to Send a Sexy Pic Without Affirmative Consent*, REASON (December 5, 2018) <https://www.reason.com/2018/12/05/nyc-considers-cyber-flashing-bill>.

<sup>80</sup> Marlis Silver Sweeney, *What the Law Can (and Can't) Do About Online Sexual Harassment*, ATLANTIC (Nov. 12, 2014) <https://theatlantic.com/technology/archive/2014/11/what-the-law-can-and-cant-do-about-online-harassment/382638/>.

<sup>81</sup> Suzannah Weiss, *8 Creative Ways Women Are Calling Out Online Dating Trolls, Because Sometimes Blocking and Reporting Aren't Enough*, BUSTLE (May 4, 2015) <https://www.bustle.com/articles/80819-8-creative-ways-women-are-calling-out-online-dating-trolls-because-sometimes-blocking-and-reporting-arent>; Alyson Krueger, *Women Turn Tables on Online Harassers*, N.Y. TIMES (May 1, 2015) <https://nyti.ms/1ON80QJ>.

<sup>82</sup> Weiss, *supra* note 80; Holmes, *supra* note 77.

New York City criminalized cyber flashing in NYC Penal Code § 245.15, which made nonconsensual dissemination of an intimate image a misdemeanor if sent with intent to cause harm to the emotional, financial, or physical wellbeing of another person,<sup>83</sup> Some commentators lamented the need for such a law when a person could arguably protect themselves from receiving unwanted lewd images by either turning off AirDrop or blocking and reporting abusers in dating and social media apps.<sup>84</sup> Critics of New York City’s statute raise concerns over allegedly permitting the NYPD to “issue subpoenas and other court orders that force [social media and app] platforms to hand over information about the account holders, just as they do for other crimes and national security issues.”<sup>85</sup> Furthermore, users of the Apple AirDrop feature are not easily traced because of the limitations of technology at the time the feature was realized.<sup>86</sup> In reality, even if a woman reports the incident and takes screen shots, there is very little to be done to track down someone who is anonymous via AirDrop, so the law may not practically lead to many convictions in that context.<sup>87</sup> Even supporters of the legislation admit that on the whole the law may prove to be primarily symbolic, and is meant to raise awareness and be a deterrent rather than be 100% effective.<sup>88</sup> One Democratic legislator who supported the bill was quoted by the N.Y. Times as saying that while he supports the law, Apple and other tech companies should share the responsibility for warning users about the potential misuse, and modify the feature to be safer, and that the “onus can’t just be on the Police Department.”<sup>89</sup>

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<sup>83</sup> N.Y. PENAL § 245.15 (2019).

<sup>84</sup> Brown, *supra* note 79.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Otterman, *supra* note 8.

<sup>89</sup> *Id.*

Another criticism of the New York City statute is the possibility that it is overbroad because it could be applied to sex workers on websites like OnlyFans or intimate partners who have a course of dealings that implicitly supports consent for unsolicited nude photographs.<sup>90</sup> However, with New York City's requirement of intent to cause harm, those issues would seem not to render the statute overbroad. Texas's recent iteration<sup>91</sup> of the criminalization of cyber flashing, however, does face more probably overbroad challenges if the language is not updated.<sup>92</sup>

**a. The Texas Response to “Dick Pic” Problem: Its Aims, Potential for Success, and its Vulnerabilities to Challenge**

Texas Penal Code § 21.19 requires criminalizes knowingly transmitting digital photos and videos of “any person engaging in sexual conduct or with the person’s intimate parts exposed” to someone else without their express consent to do so. While this is a noble attempt to create real consequences for those who would send unsolicited sexually explicit images, it nonetheless shows some vulnerability to serious challenge. Whitney Wolfe Herd, founder and CEO of feminist dating app Bumble headquartered in Austin, Texas, initially lobbied for the bill.<sup>93</sup> Ms. Wolfe Herd personally appeared before the Texas legislature to articulate a need for the criminalization of this conduct because of the limitations private apps face when attempting to deter harassment.<sup>94</sup> She testified that “one third of her platform’s female users had received unrequested explicit images” and urged that “it’s time to take into account how much bad behavior occurs online that would be illegal if it

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<sup>90</sup> Brown, *supra* note 79.

<sup>91</sup> Tex. PENAL § 21.19 (2019).

<sup>92</sup> Christine Lagorio-Chafkin, *Texas Cracks Down on Digital Sexual Harassment, With Help From Dating App Bumble*, INC. (Aug. 23, 2019) <https://www.inc.com/christine-lagorio-chafkin/texas-digital-photograph-law-bumble-whitney-wolfe-herd.html>.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*



happened face-to-face.”<sup>95</sup> The bill passed with bipartisan support on May 20, 2019 and became effective on September 1, 2019.<sup>96</sup> To date, no known cases have been tried under the new law.

Texas Penal Code 21.19, Unlawful Electronic Transmission of Sexually Explicit Material, provides in relevant part that:

A person commits an offense if the person knowingly transmits by electronic means visual material that:

- (1) depicts:
  - (A) any person engaging in sexual conduct or with the person’s intimate parts exposed; or
  - (B) covered genitals of a male person that are in a discernibly turgid state; and
- (2) is not sent at the request of or with the express consent of the recipient.<sup>97</sup>

This statute makes an admirable effort to address a broader range of cyber flashing contexts. Unlike New York City’s statute, Texas’s iteration targets unsolicited nudes sent without express consent regardless of the intent of the sender. In the words of Ms. Wolfe Herd, “just like we should have the choice of who sees us naked, we should have the choice of who we see naked.”<sup>98</sup> An express consent standard contemplates that an intent to cause harm is not an excellent standard by which offenses such as sexual harassment should be determined because of the severity of the harm that follows. For example, in Title VII, intent to cause harm is not an element of sexual harassment in the workplace.<sup>99</sup> While requiring intent to harass would not pose an issue

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<sup>95</sup> *Id.*; Adam Beam, *California Lawmaker Wants to Ban Sending Unwanted Nude Pics*, SAN DIEGO UNION-TRIBUNE (Nov. 21, 2019) <https://www.sandiegouniontribune.com/news/nation-world/story/2019-11-21/california-lawmaker-wants-to-ban-sending-unwanted-nude-pics> (since the law successfully passed in Texas, Bumble has sponsored similar legislation in California).

<sup>96</sup> Lagorio-Chafkin, *supra* note 92.

<sup>97</sup> TEX. PENAL § 21.19 (2019).

<sup>98</sup> Lagorio-Chafkin, *supra* note 92.

<sup>99</sup> 42 U.S.C. § 2000e.

where it might be more easily inferred, such as in a case of lewd sexual images sent via AirDrop where there is no need for consideration of possible implied consent or any past conduct between the parties, it could present as an obstacle for recipients of unwanted lewd images received in the context of a dating app where flirtation is an implied objective of the parties. A cyber flasher in the dating app context can more readily argue that the images were sent with intent to merely flirt or titillate, which is in keeping with some men's self-reported intentions represented in the data. Requiring express consent eliminates that obstacle and protects more women from technology enhanced sexual harassment in the form of cyber flashing.

The statute nonetheless boasts some unfortunate flaws. One primary flaw noted in several online magazines and newspapers reporting on the new law is its susceptibility to a First Amendment challenge as constitutionally overbroad.<sup>100</sup> A recent statute meant to criminalize revenge porn in the state of Texas was struck down as unconstitutionally overbroad in *Ex parte Jones*, where the court found the statute deficient when it covered more than only obscene material unprotected by the First Amendment and therefore discriminated on the basis of content in an invalid manner.<sup>101</sup> The revenge porn law was subsequently modified to require intent to harm another person, mirroring New York City's cyber flashing statute.<sup>102</sup> In the language of the two Texas statutes produced above have markedly similar flaws and can be analyzed similarly.

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<sup>100</sup> Lagorio-Chafkin, *supra* note 92; Nicole Cobler & Sebastian Herrera, *Bumble backs Texas bill aimed at fighting digital sexual harassment*, AUSTIN AMERICAN-STATESMAN (Mar. 4, 2019) <https://www.statesman.com/news/20190304/bumble-backs-texas-bill-aimed-at-fighting-digital-sexual-harassment>; Catherine Dominguez, *New Texas law makes sending sexually explicit photos illegal*, HOUS. CHRON. (Sept. 6, 2019) <https://www.chron.com/neighborhood/moco/news/article/New-law-makes-sending-sexually-explicit-photos-14419697.php#item-85307-tbla-1>.

<sup>101</sup> *Ex parte Jones*, No. 12-17-003436-CR, 2018 WL 2228888 (Tex. Ct. App. May 16, 2018).

<sup>102</sup> Dominguez, *supra* note 100.

The First Amendment requires that “Congress shall make no law ... abridging the freedom of speech.”<sup>103</sup> Any time the government attempts to regulate protected speech or expressive conduct, free speech protections are implicated.<sup>104</sup> In the state of Texas, “photographs and visual recordings are inherently expressive and ... there is no need to conduct a case-specific inquiry into whether these forms of expression convey a particularized message.”<sup>105</sup> A person’s purposeful creation of visual recordings and photographs is entitled to “the same First Amendment protection as the photographs and visual recordings themselves.”<sup>106</sup> Furthermore, there is no distinction between whether government regulation applies to “creating, distributing, or consuming speech” under a First Amendment analysis.<sup>107</sup>

In the September 2019 cyber flashing statute, the “visual material” referred to is defined in § 21.16 as “(a) any film, photograph, videotape, negative, or slide or any photographic reproduction that contains any incorporates in any manner any film, photograph, videotape, negative or slide; or (b) any disk, diskette, or other physical medium that allows an image to be displayed on a computer or other video screen and any image transmitted to a computer or other video screen by telephone line, cable, satellite transmission, or other method.”<sup>108</sup> This definition qualifies such visual material as falling under First Amendment protected speech because it is inherently expressive, therefore First Amendment freedom of speech is implicated.

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<sup>103</sup> U.S. CONST., Amend. 1.

<sup>104</sup> *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984).

<sup>105</sup> *Ex parte Jones*, 2018 WL 2228888 at \*3 (citing *Ex parte Thompson*, 442 S.W.3d 325, 336 (Tex. App. San Antonio 2014)).

<sup>106</sup> *Id.*

<sup>107</sup> *Brown v. Entm’t Merch. Ass’n*, 564 U.S. 786, 792 (2011).

<sup>108</sup> TEX. PENAL § 21.19 (2019).

Next, a court analyzing the statute in question must determine whether the speech would be regulated in a way that is content based or content neutral in manner.<sup>109</sup> Generally, statutory language that distinguishes “favored speech from disfavored speech on the basis of the ideas or views expressed are context based, whereas laws that confer benefits or impose burdens on speech without reference to the idea or views expressed are content neutral.<sup>110</sup> To determine whether the speech is content based, courts ask whether it is necessary to look at the content of the speech to decide whether the speaker violated the law in question: if affirmative, the regulation is content based.<sup>111</sup> Where laws are found to be content based, strict scrutiny applies because such laws “suppress, disadvantage, or impose differential burdens on speech,” while content neutral speech covered by the First Amendment is subject to intermediate scrutiny.<sup>112</sup>

Texas Penal Code § 21.19, like the statute in *Ex parte Jones*, does not penalize dissemination of all visual material depicting a person. Instead it penalizes visual material depicting specific types of images and content, namely those depicting a person “engaging in sexual conduct or with the person’s intimate parts exposed” or “covered genitals of a male person that are in a discernibly turgid state.”<sup>113</sup> The revenge porn law in *Ex parte Jones* contained similar language, restricting images that depicted “another person with the person’s intimate parts exposed or engaged in sexual conduct.”<sup>114</sup>

Content based restrictions on speech are only permissible when “confined to the few historic and traditional categories of expression.”<sup>115</sup> A mere conclusion that certain speech is too

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<sup>109</sup> *Ex parte Jones*, 2018 WL 2228888 at \*3.

<sup>110</sup> *Id.*; *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994).

<sup>111</sup> *Ex parte Thompson*, 442 S.W.3d 325, 345 (Tex. App. San Antonio 2014).

<sup>112</sup> *Turner Broad.*, 512 U.S. at 642.

<sup>113</sup> TEX. PENAL § 21.19 (2019).

<sup>114</sup> *Ex parte Jones*, 2018 WL 2228888 at \*4 (citing TEX. PENAL § 21.16(b)(1)).

<sup>115</sup> *Id.* (citing *U.S. v. Alvarez*, 567 U.S. 709, 717 (2012)).

harmful to be tolerated is insufficient to add new categories of unprotected speech to the list of existing categories.<sup>116</sup> Existing categories of unprotected speech include “obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.”<sup>117</sup> The standard for material to be classified as obscene is high: for speech to be prohibited as obscene, the Government seeking to enforce the statute “must prove that the [content], taken as a whole, appeals to the prurient interest,” and “is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value.”<sup>118</sup> While there is an argument that the material described in § 21.19 could be classified as obscene, the heart of the behavior sought to be rendered criminal is what amounts to technology enhanced indecent exposure. Classifying technology enhanced harassment as potential speech where the same conduct in person would be criminalized without a potential First Amendment challenge may indicate an increasingly outdated theory of law that will be inadequately prepared for further technological advances.

For the revenge pornography statute at issue in *Ex parte Jones*, the court suspected that the legislature did not intend it to fall under the obscenity unprotected speech category because the law would have been “wholly redundant in light of Texas’s obscenity statutes,” § 43.22 and § 42.23.<sup>119</sup> However, § 21.19 may not face the same redundancy issues with respect to the two obscenity statutes cited by the court in *Ex parte Jones*.

In § 42.22, the language applies when a perpetrator is reckless about “whether a person *is present* who will be offended or alarmed by the display or distribution.”<sup>120</sup> Section 21.19 is not

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<sup>116</sup> *Brown v. Entm’t Merch. Ass’n*, 564 U.S. 786, 791-92 (2011).

<sup>117</sup> *Ex parte Jones*, 2018 WL 2228888 at \*4.

<sup>118</sup> *Miller v. California*, 413 U.S. 15 (1973).

<sup>119</sup> *Id.* (citing TEX. PENAL §§ 43.22, 43.23 (West 2016)).

<sup>120</sup> TEX. PENAL § 43.22(a) (emphasis added).

redundant to § 42.22 because, in the context of cyber flashing via AirDrop or similar means, the recipient of the lewd content in question is not present anywhere in particular.<sup>121</sup> Visual material sent with AirDrop technology is capable of being distributed without the sender knowing who exactly receives it.<sup>122</sup> The lewd content is not available to anyone who might happen upon it.<sup>123</sup> In the circumstance where a cyber flasher is targeting specific strangers or acquaintances via a messaging app or other modern smartphone technology, the visual content sent is not displayed in a way that anyone unintended would be “present” to encounter it.<sup>124</sup> This existing obscenity statute is not written in a way that appears to contemplate obscene content shared via modern smartphone apps and technology.

Likewise, the language of § 42.23 might prove more problematic for legislation such as that in *Ex parte Jones* where it is meant to target revenge or deepfake pornography than it would Texas Penal Code § 21.19. Section 42.23 applies to “wholesale promotion” or possession with “intent to wholesale promote” obscene material or devices.<sup>125</sup> While revenge and deepfake revenge pornography is “distributed” and “promoted” by its very nature in order to humiliate the intended victim, cyber flashing instead targets specific victims in private digitally created spaces.<sup>126</sup> For this reason, Texas’s cyber flashing statute should not be found redundant to § 42.23 and would be more likely to qualify as a statute regulating obscene unprotected speech.

Nonetheless, it is possible that a court could find Texas Penal Code §21.19 not covered under the obscenity exception, and in such a case strict scrutiny would apply to it as a non-exempt

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<sup>121</sup> Mahdawi, *supra* note 3.

<sup>122</sup> Gallagher, *70 Women*, *supra* note 63.

<sup>123</sup> Thompson, *supra* note 31.

<sup>124</sup> *Id.*

<sup>125</sup> TEX. PENAL § 43.23(a) (West 2016).

<sup>126</sup> Gallagher, *70 Women*, *supra* note 63.

content based regulation.<sup>127</sup> Content based regulations of protected speech are presumptively invalid.<sup>128</sup> To be upheld against strict scrutiny, a regulation of expression may be only be upheld if it is “narrowly drawn to serve a compelling government interest.”<sup>129</sup> A regulation is narrowly drawn if it uses “the least restrictive means” of achieving the government interest.<sup>130</sup> In *Ex parte Jones*, the Texas Court of Appeals found that the revenge porn law in question was supported by a compelling government interest: privacy.<sup>131</sup> “Privacy constitutes a compelling government interest when the privacy interest is substantial and the invasion occurs in an intolerable manner.”<sup>132</sup> A substantial privacy interest is “invaded in an intolerable manner when a person is photographed without consent in a private place, such as a home, or with respect to an area of the person that is not exposed to the general public, such as up a skirt.”<sup>133</sup> The court in *Ex parte Jones* notes, however, that even if the statute was designed to protect a substantial privacy interest, the statute would nonetheless be unconstitutional because it was not narrowly drawn.<sup>134</sup> The revenge porn statute was found not to be narrowly drawn because its statutory language violated the rights of third parties by criminalizing the sharing of someone’s private intimate photo even if the sender had no reason to know who was in the photo or that it was being sent without consent.<sup>135</sup> The least restrictive means test was therefore not satisfied for that law and it was rendered overbroad.<sup>136</sup>

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<sup>127</sup> See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011).

<sup>128</sup> *Ex parte Hamilton*, No. 14-18-00534-CR, 2020 WL 1467362 at \*2 (Tx. Ct. App. Mar. 26, 2020).

<sup>129</sup> *Ex parte Thompson*, 442 S.W.3d 325, 344 (Tex. App. San Antonio 2014).

<sup>130</sup> *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000).

<sup>131</sup> *Ex parte Jones*, No. 12-17-003436-CR, 2018 WL 2228888 at \*4 (Tex. Ct. App. May 16, 2018).

<sup>132</sup> *Id.* (citing *Snyder v. Phelps*, 562 U.S. 443, 459 (2011)).

<sup>133</sup> *Id.* (quoting *Ex parte Thompson*, 442 S.W.3d 325, 348 (Tex. App. San Antonio 2014)).

<sup>134</sup> *Ex parte Jones*, 2018 WL 2228888 at \*5.

<sup>135</sup> *Id.* 5-6.

<sup>136</sup> *Id.*

Content based restrictions on speech beyond what the constitution allows, even as to the defendant, run a significant a significant risk of being held facially invalid for overbreadth.<sup>137</sup> The overbreadth doctrine is, however, “strong medicine” reserved as a last resort and should employed with hesitation.<sup>138</sup> The overbreadth of a statute must be substantial in order to qualify as overbroad and “found to prohibit a substantial amount of protected expression.”<sup>139</sup> Furthermore, “[t]he danger that the statute will be unconstitutionally applied must be realistic.”<sup>140</sup> The court in *Ex parte Jones* found that under the revenge porn statute as written, anyone sharing visual material regardless of their knowledge or intentions in doing so were equally liable and therefore “the criminal prohibition ... create[d] is of “alarming breadth” that is “real” and “substantial.”<sup>141</sup> The court found that the “visual material” at issue is “not otherwise protected, these persons are acting within their rights when they share visual materials with others.”<sup>142</sup>

In the current language of § 21.19 similar obstacles are faced because the law could be applied to third parties, especially because there is no element of intent in the language of the statute. For example, a panicked patient sending his doctor a photography, or a flirtatious couple sending each other photos in the context of implied consent and course of conduct based on their special relationship. This is the primary, most obvious overbreadth issue the statute could face and should be addressed in new iterations of the statute and in other attempts made in other jurisdictions.

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<sup>137</sup> *Ex parte Thompson*, at 349.

<sup>138</sup> *New York v. Ferber*, 458 U.S. 747, 769 (1982).

<sup>139</sup> *Ex parte Jones*, 2018 WL 2228888 at \*7 (citing *Ashcroft v. Free Speech Coalition*, 535 U.S. 234).

<sup>140</sup> *Regan v. Time, Inc.*, 468 U.S. 641, 651 n.8 (1984).

<sup>141</sup> *Ex parte Jones*, 2018 WL 2228888 at \*7.

<sup>142</sup> *Id.*



As is, Texas Penal Code § 21.19 faces several issues. The following section proposes updated language and standards to minimize chances of successful constitutional challenge and give a higher chance for the law to achieve its aims and protect women (and men) from cyber flashing.

#### **b. Proposal for Further States to Adopt Similar Statutes Aimed at Reducing Harm to Women**

The goal of this section is to successfully adjust the wording of Texas Penal Code § 21.19 in order to protect it against First Amendment overbreadth challenges. The following language is proposed and reasoning supplied thereafter.

This paper first proposes that § (b)(1)(A) of the Texas’s cyber flashing statute should adopt an objective standard, specifically prohibiting the depiction of “any person engaging in objectively sexual conduct or with the person’s intimate parts exposed in an objectively sexual manner.” While this is a slightly higher standard for the government to meet than the previous language, it may eliminate the need for intent to cause harm standard that Texas’s revenge porn statute and New York City’s cyber flashing statutes adopted to help avoid constitutional challenge.

As is, Texas Penal Code § 21.19 could unintentionally criminalize protected speech, such as medical speech with a doctor becoming criminalized if a patient sent a photo of any of their “intimate parts” for medical diagnosis purposes or any other reason, including breasts in the context of breast feeding advice or friendly sharing of what objectively is a photo sent in a non-sexual context. A panicked patient sending photographs of “intimate areas” for medical reasons in a hurry, without express consent, would be covered in the language in this statute if it is not changed to be narrowly drawn. An objective standard here could cure that issue. Exposing private

parts to a stranger or acquaintance without consent in an “objectively sexual manner” does not include conduct that is sent for medical or breast feeding related purposes.

Secondly, this paper proposes that § (b)(2) be rewritten with a reasonable person standard rather than require express consent of the recipient. For example, an implied special relationship, such as entering into a doctor and patient relationship, is itself an indication of potential willingness to receive visual material with intimate parts exposed. Furthermore, the course of dealing within a romantic relationship will often include a willingness to exchange objectively sexually explicit photographs. In contrast, the existing express consent standard in § (b)(2) may present an issue for romantic partners who eventually have an implied “yes” to receive objectively sexual content from each other, or could open the possibility for the law to be used as a way to punish an ex by pressing charges for nudes sent with implied consent rather than express consent.

The cumulative effect of these two changes eliminates much of the risk of third parties being caught in the overbroad language seen in the present cyber flashing statute. Under this updated language, visual material sent via electronic means is illegally sent when someone sends objectively sexualized images or videos when the sender wouldn’t have reasonably believed to have the recipient’s consent to send it.

In full, the new statute as proposed would read as follows:

A person commits an offense if the person knowingly transmits by electronic means<sup>143</sup> visual material that:

(1) depicts:

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<sup>143</sup> Another possible option is to specify that this statute visual material sent in a space where the recipient had a reasonable expectation of privacy and a space free from invasive sexualized images in an online space. The smartphone is simultaneously a window to the world but also feels private such that harassing photos and videos invade the victim’s life no matter where she goes..

- (A) any person engaging in objectively sexual conduct or with the person's intimate parts exposed in an objectively sexual manner;  
or
  - (B) covered genitals of a male person that are in a discernibly turgid state and send in an objectively sexual manner; and
- (2) is not sent unless the sender reasonably believes that the consent of the recipient is given.

Although the language above improves the likelihood of success for the statute, there are some gendered considerations, elaborated on below, to legislating a remedy for this problem that merit some mention and discussion. First, there is a risk of some disproportionate effect on homosexual men. Men receiving unsolicited penis pictures are not as likely to experience the harm sought to be prevented and are also not as likely to understand there are potential harms they should be wary of when sending nude photographs, such as the recipient feeling violated, vulnerable, or threatened. Where men are both the sender and recipient of an unsolicited sexually explicit photo or video, both parties are more likely to view the interaction in a positive light, as described in the research above. Therefore, legislation that does not take gender into account could potentially have a disproportionate impact on gay men. Nevertheless, even with the current language, merely asking for consent before sending a photo or video is all that is needed to avoid potential prosecution as well as protect against potential harm to someone male who may also feel violated by an unsolicited “flash” in certain contexts. In the context of Grindr, where such activity is common and more likely to be considered acceptable<sup>144</sup>, it could be argued that unsolicited penis pictures are part of the implied appropriate conduct among users of the app. Either way, while the data indicate that more men are comfortable with unsolicited nudes than women, not that all men everywhere are comfortable with the conduct and this law could help protect men as well.

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<sup>144</sup> Tziallas, *supra* note 72.

Another gendered aspect of the potential law is a reasonableness standard on an issue where men and women differ greatly on their perception of what is reasonable. The data indicates that men and women are likely to have opposing views on the issue of whether an unsolicited photograph of a penis is desirable, disgusting, invasive, or funny. An objective reasonableness standard runs the risk of being treated differently depending on whether the reasonable person in question is male or female, and also on whether a jury is majority female or male. In the above proposed language, an objective standard asks what a reasonable person would think, but if that person is a reasonable man versus a reasonable woman, the answer bears a fair chance of having a different answer. As stated above, the benefits of curtailing the harm are likely worth that possibility.

When challenges are eventually brought against Texas Penal Code § 21.19, it is possible that other possible issues may be found in the statute. More time and thought should be given to a new standard. However, the proposed improvements herein should significantly improve the chances of overcoming a constitutional challenge for overbreadth. The most apparent remaining issue is that the statute could be considered a content based restriction on First Amendment speech and is therefore presumptively subject to strict scrutiny. While the problem might present itself as potentially solved by arguing that the content could be permissibly censorable as obscene, modern technology's rapid development should perhaps instead inspire a reexamination of when a photograph or video becomes an action rather than speech. The rise of smartphones has created new spheres of public and private interaction. Cyber flashing should be rightly viewed as technology enhanced indecent exposure. A proper remedy should exist for targets of cyber flashing who deserve to feel safe and welcome in the world around them.

#### **IV. Conclusion**

On the whole, cyber flashing and unsolicited “dick pics” cause sufficient harm that state legislatures should take the problem seriously, fund further research on the scope of the problem and its consequences, and work to draft more effective legislation to deter and successfully prosecute online harassers.